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No. 00-0173

Supreme Court, U.S.
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In The

Supreme Court of the United States

STANLEY LAFLAMME,

Petitioner,

v.

ESSEX JUNCTION SCHOOL DISTRICT,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Vermont

REPLY BRIEF

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

The Petitioner was censured for speaking out on public issues without notice and opportunity to be heard. The issue raised by the request for writ of certiorari is whether Petitioner was entitled to due process of law.

I. Alleged Supreme Court Rule 15.2 Misstatements of Fact.

The Defendant alleges that Petitioner made two misstatements of fact in the Petition.

> 1. " 'The Defendant issued an official governmental censure without due process in retaliation for [P]etitioner's speaking out on public issues . . . ' Petition 12."

Opposition, p. 3. The Defendant points to the Censure Motion, and argues "[o]nly one of those reasons was related to Petitioners' comments." *Id.*

The Defendant quotes its board chair in saying that the Petitioner's public remarks at the May 23rd Village Trustee meeting were "the last straw." Opposition, pp. 3-4, n. 2. Hence, by Petitioner's own admission here, the Petitioner's protected public speech at the Village Trustee meeting was a motivating factor in the censure.

Moreover, the censure resolution itself specifically points to the Petitioner's attendance and statements as the cause, beginning "[a]fter viewing the tape of the Village Trustees meeting of May 23, the consensus of the members present . . . was to protect the public's interest by censuring" the Petitioner. The censure goes on to recite four specific instances of the Petitioner's political

speech as the subject of the censure.[1] Appendix p. 21. The fact that the censure was approved just based on viewing a tape of the Petitioner at the Trustees' meeting is noted in the Committee minutes. Appendix pp. 39-43. Other claims of misconduct were added later.[2]

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[1] 2. . . . "Mr. LaFlamme spoke publicly against the board-approved draft budget. He also supported the village trustees in opposing the Union High School at their May 23 meeting despite the unanimous vote of the Prudential Committee to support the Union." 3. . . . "Mr. LaFlamme has made public unsubstantiated allegations. . . . " 4. . . . "Mr. LaFlamme corroborated the inaccurate data presented at the trustees meeting, and his statements about teacher job security were not factual." 5. . . . "Mr. LaFlamme invited the trustees to make their presentation at the Prudential Committee hearing. . . . " Appendix, p. 22-23.

[2] Testimony of Board Secretary Soule, Transcript September 3, 1995, p. 128 l. 22 – p. 129, l. 7, p. 129 l. 13 – p. 130 l. 4:

> Q And at that meeting, the Trustees – the Prudential Committee watched the tape of the Trustees meeting?
>
> A Yes.
>
> Q Okay. And after that the trust – the Prudential Committee decided to censure Mr. Laflamme [sic]?
>
> A After we watched the tape?
>
> Q Yes.
>
> A Is that the question? We – we had a discussion that there would be a censure if legal counsel was in approval.
>
> * * *
>
> Q And you also decided at that meeting to contact other members of the Prudential Committee to get other policies or anything that you felt should be included in the censure, isn't that correct?

The second alleged misstatement is claimed as follows:

> 2. "At trial, the Defendant made no objection to the substance of the trial court's instructions to the jury." Petition 10.

Opposition at p. 3. While Defendant opposed *any* due process instruction, Defendant made no objection to the *substance* of the due process instructions given.[3] The

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> A As part of the discussion, all the other members of the Prudential Committee was – were there that night.
>
> Q Right.
>
> A And as part of the discussion, we were requested to give material to Miss Mooney.
>
> Q Okay. And you were to get Miss Mooney any policies or anything that people felt should be included in the censure, correct?
>
> A Correct.

[3] The Defendant's only preserved objection to the due process charge was as follows:

> Next, we object on that same page to the charge, the plaintiff's third (unclear), for violation of his Constitutional rights by depriving him of liberty without due process of law. Should not have been charged to the jury. We don't believe that we were properly noticed and did not consider it an action or claim that plaintiff was bringing. It had not been raised in this action at any time before the Judge mentioned it in chambers after hearing a portion of the evidence by plaintiff's counsel or at any other time. It appears only in one phrase in or (unclear) in the complaint, paragraph 18, specifically, which plaintiff has identified.

Transcript, Attorney Thomas Higgins, September 4, 1997, p. 318, ll. 14-25.

instructions are therefore taken as a correct statement of law,[4] and the verdict sustained if supported by the evidence. Though Defendant made an initial, vague objection, Defendant did not renew its objection, nor request a limiting instruction on the evidence. *Compare,* Vt. R. Evid. 103, 105.

Absent an objection to the substance of the jury instructions, a court must determine on all the evidence whether "there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." *Reeves v. Sanderson Plumbing Prod.*, ___ U.S. ___, 120 S. Ct. 2097, 2109, 147 L. Ed. 2d 105, 121 (2000), *quoting* Fed. R. Civ. P. 50(a); *accord, Claude G. Dern Elec. v. Bernstein,* 144 Vt. 423, 426, 479 A.2d 136, 138 (1984). The explicit motivation to punish the Petitioner for his political speech provides a legally sufficient basis for a right to due process. That motivation appears even on the surface of the censure and is admitted here by Defendant.

It is the controlling law of this case that the trial court correctly set out the elements of due process as acting under color of law, the Defendant deprived the Petitioner of liberty without due process of law. Appendix. pp. 47-48.

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[4] Vt. R. Civ. P. 51(b); *Wood v. Wood,* 166 Vt. 608, 608-609, 693 A.2d 673 (1997). Where there was no objection to the substance of the court's instructions, the Court's charge to the jury becomes the controlling law of the case. *Lemnah v. American Breeders Serv.*, 144 Vt. 568, 573-74, 482 A.2d 700 (1984); *Jackson v. Rogers,* 120 Vt. 138, 144, 134 A.2d 620, 623 (1957); see *Lent v. Huntoon,* 143 Vt. 539, 554, 470 A.2d 1162, 1172 (1983).

II. The Claim that the Petition Does Not Present an Issue Addressed by the Vermont Supreme Court

Defendant's underlying claim is that the Petitioner seeks review for impingement of his right of free speech that was not properly presented to or addressed by the Vermont Supreme Court. The Petitioner concedes that the Vermont Supreme Court did address the Petitioner's claim, albeit in what Defendant describes as "one paragraph." Opposition, p. 7. In fact the Court addressed the issue directly and in some detail, ruling that the Petitioner's failure to prevail on his claim of prior restraint prevented him from arguing retaliation in the due process claim. Appendix pp. 30-31.

In the Vermont Supreme Court, the Petitioner extensively briefed the standard of review, the evidentiary basis, and the "stigma plus" analysis that "the censure was motivated by an effort both to punish free speech and in an effort to stifle future free association and speech, the conduct is actionable even for a volunteer position"[5], the last issue consuming pages 18-25 of its brief. The Petitioner also filed a Motion to Reargue on the grounds that the Vermont Supreme Court had denied the Petitioner the right to trial by jury in treating the adverse verdict on the prior restraint issue as dispositive of the motive for the censure on the due process claim. The Petitioner has always presented this case as a retaliation case, and specifically argued at trial the "stigma plus

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[5] Petitioner's Brief before the Vermont Supreme Court, pp. 18-19.

analysis" of *Little v. City of Miami*,[6] which is a case directly on point to the facts here.

Since the Petitioner fully presented the issue to the Vermont Supreme Court, and the Vermont Supreme Court explicitly ruled, the Petitioner has complied with both of the alternate standards of *Adams v. Robertson*, 520 U.S. 83, 86, 117 S. Ct. 1028, 1029, 137 L. Ed. 2d 203 (1997).

III. Petitioner Has Asserted that He Has Been Deprived of a Federally Protected Property Right or Liberty Interest

The Defendant also argues that no federal rights are implicated, because the Petitioner has no protected liberty or property interest in his office, relying on *Snowden v. Hughes*, 321 U.S. 1, 7 (1944), *rehearing denied*, 321 U.S. 804 (1944). The *Snowden* Court ruled that misapplication of a facially neutral state statute to a candidate for public office, with nothing more, did not violate the Fourteenth Amendment. The Court took pains to note that no other constitutional violation or discrimination was alleged.

Snowden involved no implication of First Amendment or other activity protected by the Bill of Rights through the Fourteenth Amendment. The rights of Free Speech and Free Assembly apply to the states through the Fourteenth Amendment. *See, e.g. Fisk v. Kansas*, 274 U.S. 380, 387 (1927); *DeJonge v. Oregon*, 299 U.S. 353, 364 (1937). Where First Amendment rights are implicated as to state officers, state officials are subject to an action under the

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[6] *Little v. City of North Miami*, 805 F.2d 962, 967-968 (11th Cir. 1986); Transcript, September 4, 1997, argument of Edwin Hobson in chambers.

Fourteenth Amendment by candidates or even voluntary state employees. *Hadnot v. Amos*, 394 U.S. 358, 364, 89 S. Ct. 1101, 1104, 22 L. Ed. 2d 336 (1969); *Elrod v. Burns*, 427 U.S. 347 (1976) (patronage employees not protected against dismissal are protected when dismissed for exercise of First Amendment rights); *Hyland v. Wonder*, 972 F.2d 1129, 1135 (9th Cir. 1992) *cert. denied*, 508 U.S. 908 (volunteer protected against dismissal for exercise of First Amendment rights).

Punishing an elected school board member for speaking out publicly on school board matters is repugnant to the First and Fourteenth Amendments. "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75, 85 S. Ct. 209, 216, 13 L. Ed. 2d 125 (1964).

CONCLUSION

This case presents the question of whether an elected member of a governmental body can be subject to official discipline without due process of law because he spoke out on public issues. As the Courts of Appeal and the Vermont Supreme Court have reached different answers to this important question of due process, this Court should grant this Petition for Writ of Certiorari.

Respectfully submitted,

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